

Chap. 11 Confirmation

In re Donald and Julie Towry  
7/3/97 FRA

695-64263-fra11  
Unpublished

The Debtors own and operate a business in which they order and install camper tops on customers' vehicles. The Debtors began in Chapter 13 and converted to Chapter 11 when it became evident that they exceeded the debt threshold for Chapter 13.

A plan of reorganization was submitted which obtained the required number of votes for acceptance. A number of objections to confirmation were filed, however, chiefly having to do with feasibility.

A confirmation hearing was held in which testimony was given and objections heard. The court reviewed the documents submitted and determined that the Debtors did not have enough cash to pay administrative claims on the effective date of the plan. Additionally, cash flow was not sufficient for the ongoing payment of expenses. Because the Debtors could not satisfy the requirements of §§ 1129(a)(9)(A) and (a)(11), confirmation was denied. The court granted the U.S. Trustee's motion to convert to Chapter 7.

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8 UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF OREGON

10 IN RE )  
11 DONALD G. TOWRY and ) Case No. 695-64263-fra11  
12 JULIE R. TOWRY, )  
13 \_\_\_\_\_ ) MEMORANDUM  
Debtors. )

14 Debtors' proposed Chapter 11 plan of reorganization was the  
15 subject of a confirmation hearing held on June 19, 1997. Having  
16 considered the evidence and testimony of the Debtors, and several  
17 objecting creditors, I conclude that the plan cannot be  
18 confirmed, and that the case should be converted to one under  
19 Chapter 7 of the Bankruptcy Code.

20 I. CONFIRMATION

21 The proposed plan fails to meet at least two mandatory  
22 conditions of confirmation:

23 Payment of Administrative Expenses

24 The Code requires that all post-petition administrative  
25 expenses be paid as of the effective date of the plan.

26 §1129(a)(9)(A). Debtor Julie Towry testified that \$39,000 is (or

1 would be) available to pay such expenses. However, allowed  
2 claims total, as of the date of the hearing, over \$61,000.00.  
3 Debtors indicated that they thought the claims were excessive,  
4 and would object; however, no evidence was offered respecting the  
5 nature of the tax claim or the objection, or the likelihood of a  
6 successful challenge.<sup>1</sup> Under these circumstances the Court must,  
7 for purposes of this analysis, consider the claims as allowed in  
8 the amount filed.

9 Feasibility

10 In order to confirm a plan of reorganization the Court must  
11 find that

12 Confirmation of the plan is not likely to be followed  
13 by the liquidation, or the need for further financial  
14 reorganization, of the debtor or any successor to the  
15 debtor under the plan, unless such liquidation or  
16 reorganization is proposed in the plan. 11 U.S.C.  
17 § 1129(a)(11).

18 In short, the Court must find that the plan is feasible.  
19 This provision of the Code does not require that the debtor  
20 guarantee success, or even that the Court find a high likelihood  
21 of success. In re Parish & St. Joseph Partners Limited  
22 Partnership, 169 B.R. 669 (D. AZ. 1994). However, Debtors still  
23 bear the burden of proving, by a preponderance of the evidence,  
24 that the need for further financial reorganization is not likely.  
25 I find that, on the evidence presented in this case, the Debtors

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26 <sup>1</sup> The Court is aware that the objections to the tax claims  
were filed on June 23. However, the objections were not  
available to the Court or parties at the hearing. Accordingly,  
the objections are not considered.

1 have not met that burden.

2 Debtors' principal evidence regarding the financial  
3 condition of their family and business is a summary of the Rule  
4 2015 reports filed August 1996 through April 1997, presented as  
5 Exhibit H. No formal projection of future income was made;  
6 Debtors simply maintained that the Court should rely on the past  
7 nine or ten months to find that the Debtors' future income would  
8 be sufficient to fund the plan. No evidence was presented to  
9 support the accuracy of the data; however, there was no challenge  
10 to any of it, either. Still, even assuming that the data and the  
11 suggested extrapolation are reliable, it does not appear that  
12 revenues will be sufficient to make all payments required by the  
13 plan after the effective date.

14 The average monthly "income (loss) before taxes" set out in  
15 the exhibit is \$10,803.49. The exhibit shows the same figure for  
16 "net income (loss)" two lines below. However, no provision is  
17 made for income taxes. It was testified that \$20,697.00 was  
18 paid to the Internal Revenue Service in April 1997, along with  
19 Debtors' request for an extension of time to file their 1996  
20 return. Assuming the estimate submitted with the request  
21 accurately reflects a year's taxes, the monthly net income after  
22 taxes should reflect a monthly tax payment of \$1,724.75, leaving  
23 an average net income available for plan payments of \$9,078.74.

24 Exhibit J sets out projected plan payments for the first 18  
25 months of the plan. The Debtors project monthly payments,  
26 commencing July 1997, average \$11,159.00.

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2       Using Debtors' own figures, and a starting cash balance of  
3 \$10,489.51, it appears that if all projected payments are made  
4 out of the projected income, Debtors' cash reserves will be  
5 exhausted by December 1997. Debtors will then only have about  
6 \$9,500.00 available to make a \$24,000.00 projected payment. See

Month	Net income	Cash	Payment	Balance
July	\$ 9,093.00	\$ 10,489.51	\$ 4,405.84	\$ 15,176.67
August	\$ 9,093.00	\$ 15,176.67	\$ 8,646.63	\$ 15,623.04
September	\$ 9,093.00	\$ 15,623.04	\$ 8,646.63	\$ 16,069.41
October	\$ 9,093.00	\$ 16,069.41	\$ 19,656.32	\$ 5,506.09
November	\$ 9,093.00	\$ 5,506.09	\$ 11,646.63	\$ 2,952.46
December	\$ 9,093.00	\$ 2,952.46	\$ 11,646.63	\$ 398.83
January	\$ 9,093.00	\$ 398.83	\$ 20,656.25	\$ (11,164.42)

13 Figure A.

15 Fig. A. Source: Debtors' Exhibits H and J

16       Debtors will have available \$174,163.51<sup>2</sup> in the first 18  
17 months, while total payments projected payments are \$200,860.11.  
18 It is clear that the Debtors' business would not survive the  
19 first six months, and certainly not the first 18, without further  
20 reorganization. While increased cash flow might solve the  
21 problem, there is no evidence from which I can find such an  
22 increase is likely.

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25       <sup>2</sup>\$9,093/month for 18 months, plus the beginning cash on hand  
26 of \$10,489.52. Other cash on hand at the proposed effective date  
is committed to payment of administrative expenses.

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3       The Debtors' projection respecting plan payments assumes  
4 that total unsecured debt to be paid is \$200,934.50.<sup>3</sup> It appears  
5 that, at the time of the hearing, total unsecured claims equaled  
6 \$360,956.60. (See Debtors' Exhibit L.) The Debtors contend that  
7 the claims as filed can be reduced by nearly 45% through  
8 successful objections. This further presumes that each of the  
9 objections to be filed will be sustained. No evidence was  
10 presented at the hearing supporting this prediction, and I am not  
11 prepared to accept it at face value. To be sure, a number of  
12 objections (e.g., that one claim duplicates another) may be  
13 rejected as a matter of course. However, the nature and validity  
14 of substantive objections, and the cost of litigating them,  
15 remains unclear. I believe it likely that the amount to be paid  
16 to unsecured creditors will be greater than Debtors believe.

17       There are several other concerns which should be noted:

18       1. No provision is made in the plan for priority wage  
19 claims. Debtors indicated that they may object, but this  
20 response, like the proposal regarding unsecured creditors, is not  
21 backed up by substantial evidence.

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25       <sup>3</sup> The plan provides that unsecured creditors will receive  
26 25% of their claims, paid in 12 equal quarterly installments,  
commencing on the third month after the effective date.

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3 2. No provision is made for continuing legal fees. These  
4 are likely to be considerable, given the fact that Debtors intend  
5 to object to several dozen claims.<sup>4</sup>

6 3. Debtors testified that it is their practice to sell  
7 merchandise by taking 50% down, purchasing the product, and then  
8 taking the additional 50% on delivery. It appears from Debtor  
9 Julie Towry's testimony that Debtors consider the down payment  
10 "their" money, even before the product is ordered, much less  
11 delivered. This failure to place in reserve deposits by  
12 customers calls into doubt the viability of Debtors' cash  
13 reserves, and their ability to respond to exigencies such as the  
14 failure of a supplier to provide product on a timely basis.

15 To summarize, I find that the cash flow which one can  
16 reasonably assume Debtors will enjoy is not sufficient to pay all  
17 the debt required to be paid under the plan, even in Debtors'  
18 best case scenario. It follows that it is the Court's duty to  
19 deny confirmation of the plan.

20 A number of other objections to confirmation were raised.  
21 Given the forgoing, and the fact that the case is to be  
22 converted, I do not reach the issues raised by these objections.

## 23 II. CONVERSION

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25 <sup>4</sup> Several objections to claims, on this Court's local form  
26 763.2, were submitted to the Clerk's office on June 18. They  
were not introduced at the hearing, and are not considered for  
the purposes of either the confirmation or the conversion issue.

1 Prior to the confirmation hearing the U. S. Trustee filed a  
2 motion seeking conversion of the case in the event the proposed  
3 plan cannot be confirmed. The motion should be allowed. The  
4 case was commenced on October 31, 1995 as a Chapter 13 case.  
5 After experiencing considerable difficulty in the Chapter 13  
6 process, Debtors moved to convert the case to Chapter 11, which  
7 motion was allowed on July 31, 1996.

8 The U.S. Trustee points out several factors supporting  
9 conversion, including:

10 a. Continuing loss to or diminution of the estate and the  
11 absence of a reasonable likelihood of rehabilitation,  
12 11 U.S.C. §1112(b)(1);

13 b. Inability to effectuate a plan 11 U.S.C. § 1112(b)(2);  
14 and

15 c. Delay prejudicial to creditors, 11 U.S.C. § 1112(b)(5).

16 Each of these elements is present here. Of particular  
17 concern is the length of time it took to get even a first  
18 proposed plan before the Court. I think it is inappropriate to  
19 allow the Debtors to continue in reorganization.

20 An order will be entered denying confirmation, and  
21 converting the case to one under Chapter 7. This memorandum sets  
22 out my findings of fact and conclusions of law in this matter,  
23 which will not be separately stated.

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26 FRANK R. ALLEY, III  
Bankruptcy Judge



cc: G. Williams, P. Garrick, S. Egnor, B. Copeland, K. Boyd, C. Wade